

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DOUGLAS D. ECHIBERI and DEPARTMENT OF THE ARMY,
DIRECTORATE OF FACILITIES ENGINEERING, Ft. Shafter, HI

*Docket No. 99-1194; Submitted on the Record;
Issued March 22, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof to establish that he was disabled for work on or after November 19, 1997, due to his accepted cervical strain injury on October 15, 1987.

On October 16, 1987 appellant, then a 36-year-old maintenance worker, filed a notice of traumatic injury and claim for continuation of pay/compensation alleging that on October 15, 1987, while using a ram set nail gun to fasten a two by four on a concrete wall, he felt a tingling sensation in his left arms and fingers. The claim was accepted for a cervical strain.

On December 4, 1997 appellant filed a notice of recurrence of disability and claim for continuation of pay (Form CA-2a), alleging that he sustained a recurrence of the October 15, 1987 injury on November 19, 1997. He stated that, on doctor's orders, he returned to work with temporary physical limitations. However, appellant noted the injury "flared[-]up" at various times for unknown reasons, causing chronic pain in the neck, shoulders and arms with tingling sensation and numbness on various fingertips. He noted that he was able to tolerate the pain with medication and physical therapy.

In support thereof, appellant submitted a medical report by Dr. Kenneth K. Nakano, a Board-certified neurologist, dated December 1, 1997, wherein he indicated that appellant was seen on December 1, 1997 for a consultation regarding a cervical disc protrusion. Dr. Nakano indicated that his examination of appellant showed limited extension of his neck, weakness in his left biceps, brachial radialis and supra-infraspinatus muscles. He believed that appellant had a left C6 radiculopathy and recommended a magnetic resonance imaging (MRI) scan. Dr. Nakano also submitted a medical evaluation for light duty on that date wherein he indicated that appellant suffered from a cervical disc injury and was not to work for six to eight weeks.

On December 11, 1997 Dr. Ann Ohata, a Board-certified diagnostic radiologist, performed an MRI scan and found, *inter alia*, straightening of the spine which may be due to

muscle spasm, degenerative disc changes at C4-5, C5-6 and C6-7, broad disc protrusion and left posterolateral disc herniation at C4-5 with bilateral foraminal narrowing, left posterolateral disc bulge and osteophyte at C5-6 and bilateral posterolateral disc bulge at C6-7.

On December 26, 1997 Dr. Nakano indicated that appellant's absences from work were due to his work-related cervical disc. In a February 24, 1998 report, he stated:

"According to the history as well as the clinical findings, it would appear more likely than not that there exists a causal relationship between [appellant's] current disability and the original injury as previously documented."

On February 19, 1998 the Office of Workers' Compensation Programs referred appellant to Dr. Ramon H. Bagby, a Board-certified orthopedic surgeon, for a second opinion. In a medical opinion dated April 21, 1998, he found that appellant had degenerative arthritis, cervical spine; possible herniated cervical disc C4-5, questionable radiculopathy, left upper extremity and questionable right carpal tunnel syndrome. Dr. Bagby opined that a review of the medical record shows that his evaluators are in agreement that appellant could continue working. He also stated that none of his evaluators feel strongly that his particular work has industrially caused his condition. Dr. Bagby found that the absence of significant atrophy in light of the depressed reflexes would lead one to question significant neurologic pathology. With regard to causation, he concluded:

"While [appellant] does have evidence of significant degenerative disease within the cervical spine, there is no indication that the injuries described have a direct causal relationship. Rather it is more likely that, from time to time, [he] does have temporary aggravation of his condition, which represents natural progression."

With regard to disability status, Dr. Bagby opined:

"For the particular injury of October 15, 1987, [appellant] has reached a permanent and stationary status. It is my opinion that [he] has had no permanent impairment as a result of this particular injury in that it was just, at most, a temporary aggravation of a preexisting condition."

Dr. Bagby also noted that appellant needed no future medical care as a result of the injury of October 15, 1987. He noted that appellant's prognosis remained guarded and that claimant may require additional treatment including cervical traction, cervical neck exercises and possibly surgical intervention; however, this was not as a result of the injury of October 15, 1987. Dr. Bagby concluded:

"In my opinion, [appellant] does not continue to suffer residuals of the specific injury of October 15, 1987. My medical reasons are based on the significant amount of degenerative change that has been present in [his] cervical spine. The injury of October 15, 1987 in no way accounted for the cervical pathology noted. Although [appellant] may continue with some subjective symptoms, these are felt

to be due to the preexisting cervical pathology and not due to the relatively minor injury of October 15, 1987.”

In a decision dated May 12, 1998, the Office found that appellant had not established causal relationship and accordingly, denied his claim.

On August 13, 1998 appellant submitted a request for reconsideration. In support thereof, he submitted numerous documents already in evidence, including medical progress notes by Dr. Terry A. Vernoy, an orthopedic surgeon, which date back to his original injury in October 1987.

On September 1, 1998 the Office reviewed appellant’s request for reconsideration on the merits and found that the evidence submitted in support of his reconsideration request did not establish a recurrence causally related to the October 15, 1987 injury. The Office found that the information submitted was repetitive of that already in the record with the exception of a July 13, 1998 medical records request. Once again, the Office found that the weight of the opinion rested with Dr. Bagby’s report as it was thorough and well rationalized and Dr. Nakano’s report was speculative.

By letter dated October 22, 1998, appellant again requested reconsideration. In support of his request, appellant submitted a medical report by Dr. Vernoy, appellant’s treating orthopedic surgeon, dated October 10, 1998, wherein he stated that appellant had a C5-6 radiculopathy on the left side secondary to disc protrusion and osteophytes at the C4-5, C5-6 levels. He opined:

“I believe [appellant’s] injury is related to his injury of October 15, 1987, however, with the reports given to me, I believe his injury of October 15, 1987 and subsequently are aggravations of a previous existing problem that [appellant] had been treated for by myself and apparently Dr. Olderr at [the] Fronk and Straub Clinic. Therefore, at this point in time, I believe [appellant] should continue with conservative therapy. I do believe that operative intervention is indicated and that he should obtain further evaluation and care from an orthopedic surgeon or neurosurgeon who does cervical spine surgical procedures. Once again, it is noted [that appellant] has refused surgery in the past; however, I believe he has reached a point in his life where he cannot live the way he is living now and it is pointed out to him that because he has waited so long, that no matter what type of surgery he has, there will most likely not be any guarantee that permanent damage has not already been done....”

In an October 15, 1998 medical report, Dr. Jose C. de Leon, in an opinion that he states is limited to secondhand information and based mainly on the report of Dr. Vernoy, opined:

“[Appellant] indeed suffered from significant C4-5, C5-6 radiculopathy due to disc protrusion and osteophytes in those levels. It was generally agreed by all treating physician[s] that current symptoms [are] directly related to the incident. His left-sided upper extremity weakness, tingling pain and at times numbness, presents difficulty in returning to his usual arduous job around potentially

hazardous construction sites and if forced to do so almost 100 percent chance of hurting himself or cause accident that might hurt other people.”

Also attached were medical notes from Dr. Nakano dated June 4 and July 30, 1998, wherein he suggested that appellant consult with Drs. Chong or Vernoy.

By decision dated November 4, 1998, the Office found that the medical evidence submitted in support of the request for reconsideration was insufficient to modify its prior denial of benefits.

The Board finds that this case is not in posture for decision.

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.¹ This burden includes the necessity of furnishing medical evidence from a physician, who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.² Where no such rationale is present, medical evidence is of diminished probative value.³

In the present case, a conflict exists between the opinion of appellant’s treating physicians, Drs. Nagamo and Vernoy and that of the physician who provided the second opinion for the Office, Dr. Bagby. In his opinion dated December 1, 1997, Dr. Nakano indicated that appellant suffered from a cervical disc injury and was not to work for six weeks. In a report dated February 24, 1998, Dr. Nakano stated that “it would appear more likely than not” that a causal relationship existed between appellant current cervical disc injury and the original injury. Similarly, Dr. Vernoy opined that appellant suffered from C5-6 radiculopathy on the left side secondary to disc protrusion and osteophytes at the C4-5, C5-6 levels and opined that he believed that this injury was related to his October 15, 1987 injury. However, Dr. Bagby, the second opinion physician, disagreed and concluded that appellant did not suffer residuals of the specific injury of October 15, 1987.

Section 8123(a) of the Federal Employees’ Compensation Act provides that where there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination.⁴ The case, therefore, requires remand for an impartial medical specialist to resolve the conflict between the opinions of Drs. Nakano and Vernoy and that of Dr. Bagby. On remand, the Office should refer the case record with a statement of accepted facts to an

¹ *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

² *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

³ *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

⁴ 5 U.S.C. § 8123(a); *Esther Velasquez*, 45 ECAB 249, 252-53 (1993).

appropriate medical specialist pursuant to section 8123(a) of the Act. Following this and such development as the Office deems necessary; it shall issue a *de novo* decision.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated November 4, September 1 and May 12, 1998 are set aside and the case is remanded in accordance with this decision.

Dated, Washington, DC
March 22, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member